No. 89-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,
Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer under the Railway Labor Act can enter into a collective bargaining agreement which contains a successorship clause, then breach that clause by entering into a merger with another RLA employer in which the collective bargaining agreement does not survive, and then escape an arbitral award of damages for its breach by claiming that the merger has rendered compliance with the successorship clause impossible.

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BRIEF IN OPPOSITION

The opinions below, the basis for the Court's jurisdiction, and the statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 1.

STATEMENT OF THE CASE

At the times relevant here, Western Air Lines, Inc. ("Western") and the Association of Flight Attendants, AFL-CIO ("AFA" or "the Union"), were parties to a collective bargaining agreement dated October 1, 1984, which had been negotiated under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). Pet. App. 2a. That

agreement contained, *inter alia*, a successorship clause stating:

> This Agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the provisions of the Railway Labor Act, as amended. [Pet. App. 3a]

In accordance with the RLA, the collective bargaining agreement also provided for arbitration of all disputes over the interpretation or application of contract provisions before a System Board of Adjustment. Pet. App. 2a-3a.

In September 1986 Western entered into a merger agreement with Delta Air Lines, Inc. ("Delta"). The Western-Delta agreement provided, first of all, that on December 18, 1986, Delta was to acquire Western and operate it as a separate subsidiary until March 31, 1987. That agreement also provided that on April 1, 1987, Western was to be merged into Delta and that Western would cease to exist as a separate entity. The merger agreement did not make any provision for survival of the Western-AFA collective bargaining agreement. Pet. App. 3a.

On October 21, 1986, AFA filed a grievance challenging Western's breach of the successorship clause in the collective bargaining agreement. Western refused to arbitrate on the grounds that the grievance raised a representation dispute committed to the exclusive jurisdiction of the National Mediation Board ("NMB"). On January 8, 1987, AFA therefore filed suit to compel arbitration. Pet. App. 3a. The district court dismissed the case for lack of subject matter jurisdiction, holding that arbitration would interfere with the NMB's exclusive jurisdiction to determine who was the post-merger representative of the flight attendants. 662 F.Supp. 1, 3 (D.D.C. 1987). Pet. App. 2a. AFA appealed that adverse decision.

During the pendency of the Union's appeal, the NMB ruled that, as of April 1, 1987, the date of the operational merger of Western into Delta, AFA's certification as the representative of the Western flight attendants was extinguished and the Union no longer represented any employees on the merged airline. *Delta Air Lines/Western Air Lines*, 14 N.M.B. 291 (1987). Pet. App. 5a. The NMB made clear that its decision had no effect whatsoever on the processing of grievances arising out of "vested contractual rights." 14 N.M.B. at 301 and n.2.

On the basis of the NMB's decision, Delta moved to dismiss AFA's appeal as moot. The court of appeals denied that motion on the ground that while a " 'claim based on any right of continued representation' was moot. . . it was 'not clear whether an arbitrator could award damages for breach of the collective bargaining agreement.' " Pet. App. 6a. Therefore, the court below ruled that AFA's grievance, insofar as AFA sought damages for breach of the successorship clause in the Western-AFA collective bargaining agreement, does *not* raise a representation dispute, and that the district court therefore had jurisdiction to order arbitration of AFA's damages claim against Western. Pet. App. 24.[1]

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[1] Two other unions, the International Brotherhood of Teamsters and the Air Transport Employees, also had collective bargaining agreements with Western which contained successorship clauses. These unions each filed suit in the Central District of California to compel arbitration over Western's breach of the successorship clauses, and each sought injunctions preserving the status quo pending arbitration. The Ninth Circuit directed the district court to order arbitration, and enjoined the merger. *IBTCWHA* v. *Western Air Lines, Inc.*, 813 F.2d 1359, 1364 (9th Cir. 1987) ("*Teamsters*").

On April 1, 1987, the date of the operational merger, Justice O'Connor granted the carriers' *ex parte* application for stay of the Ninth Circuit's order. *Western Airlines, Inc.* v. *Int'l Bhd. of Teamsters*, 480 U.S. 1301 (1987) (in chambers). Thereafter, Western and Delta consummated the merger. Pet. App. 5a. This Court subsequently granted *certiorari* in *Teamsters*, vacated the Ninth

ARGUMENT

The decision below is the *first* court of appeals ruling on a novel question: whether an employer covered by the Railway Labor Act may first enter into a collective bargaining agreement containing a successorship clause with a union representing its employees, then breach the undertaking contained therein by entering into a merger agreement with another RLA employer that does not provide for the continuation of the collective bargaining agreement and, finally, escape damages liability for its breach of the successorship promise by claiming that the union's effort to enforce the clause by securing damages creates a representation dispute within the National Mediation Board's exclusive jurisdiction.

The court of appeals—treating the matter as *res nova* and recognizing that successorship clauses are consistent with public policy, that *the* basic principle of contract law is that a contracting party is *not* free to breach its undertakings with impunity, and that in these circumstances a damages award would not interfere with the RLA scheme for determining collective bargaining representatives—ruled that unions may seek to rectify a breach of a successorship clause by seeking damages through arbitration. Pet. App. 23a-24a.

In implicit recognition that the court of appeals reasoning is impeccable, that its conclusion is in complete accord with this Court's federal labor contract jurisprudence as developed in analogous situations, and that, in any event, the issue presented here is in its nascent litigation stage and is not yet worthy of this Court's time and attention, the *certiorari* petition attempts to create a conflict between the decision below and a line of decisions treating

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Circuit's order, and remanded the case to the Ninth Circuit to consider the question of mootness. *Teamsters*, 484 U.S. 806 (1987). The Ninth Circuit, during the pendency of the appeal in this case, dismissed that case as moot in a *per curiam* order. *Teamsters*, 854 F.2d 1178 (9th Cir. 1988). Pet. App. 6a.

with a conceptually distinct legal question. The petition claims that "in order to award damages or any relief, an arbitrator would first have to make a finding . . . that the successor clause of the AFA/Western contract entitled AFA to be recognized by Delta as the representative of former Western flight attendants . . . [and that] such a finding would invade the exclusive jurisdiction of the NMB." Pet. 7.

But, as the court of appeals stated in rejecting the same argument, the petition's premise is wrong and the "specific performance" cases relied on there are therefore inapposite:

> Assuming, as we must in this context, that Western was obliged by the successorship clause to bind any merger partner to the. . . [collective bargaining agreement], an arbitrator might find that Western was required to structure the merger so as to preserve itself as a separate operating entity. In that event, the arbitrator might also find that the NMB's determination to extinguish AFA's certification as representative of the former Western flight attendants was a foreseeable consequence of Western's breach, and that the carrier is liable to AFA for its contract damages. The situation would be no different analytically if the. . . [collective bargaining agreement] had expressly provided for a sum of liquidated damages in the event that Western breached the successorship clause. [Pet. App. 8a-9a].

The short of the matter is this: the question here has been presented to only one court of appeals and is best left to development through the process of litigating elucidation in the lower courts; the court of appeals' answer to that question is sound and is consistent with the applicable general principles developed by this Court; and the decision below is *not* in conflict with any decision in the court of appeals or in this Court.

The *certiorari* petition should be denied.

1. The court of appeals' decision rests on the fundamental principle of labor law that the terms of a collective bargaining agreement establish the "rule of law" which governs the relationship between the contracting parties. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). *Accord*, *Andrews* v. *Louisville & N. R.R. Co.*, 406 U.S. 320, 322 (1972). And, as the court below recognized, that rule applies fully to successorship clauses. Pet. App. 22a-23a.

The decision below is also grounded in a second uncontestable tenet of labor law, namely, that an employer who enters into and subsequently breaches an enforceable promise contained in a collective bargaining agreement must pay the consequence of its breach as determined by an arbitrator. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 569 (1960). Indeed, this Court has explicitly sanctioned an arbitral award of damages once an employer's actions make specific performance of its contractual obligations impossible. *W.R. Grace Co.* v. *Local Union 759*, 461 U.S. 757, 768-69 (1983); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 459 (1957).

Most to the point, this Court has twice rejected petitioner's argument that compliance with an inconsistent contractual obligation insulates an employer from damages liability for breach of a collective bargaining agreement. In *W.R. Grace*, *supra*, 461 U.S. 757, the Court upheld an arbitrator's award of damages for an employer's breach of the collective bargaining agreement, and flatly rejected the employer's defense that its conflicting obligations under a Title VII conciliation agreement rendered compliance with the labor contract impossible. Finding that "[t]he Company committed itself voluntarily to two conflicting contractual obligations," the Court held that the arbitrator's decision merely "allocate[d] to the Company the losses caused by the Company's decision" to

honor one set of obligations at the expense of those contained in the collective bargaining agreement. *Id.* at 767.

Similarly, in *Belknap* v. *Hale*, 463 U.S. 491 (1983), this Court rejected the argument that an employer's strike settlement with a union preempted a damages suit for misrepresentation and breach of contract by strike replacements who had received promises of permanent employment but who were laid off pursuant to the strike settlement. In upholding the viability of the damages suit, the Court spurned the notion that an employer's conflicting obligations arising from an agreement with a union can render "essentially meaningless" the promises contained in an employment contract. *Id.* at 500.

In sum, the decision below—taken in its own terms—is in full accord with this Court's teachings in the *Steelworkers Triology* and in *W.R. Grace* and *Belknap*.[2] Petitioners do not point to a single case in this Court concerning the enforcement of a collective bargaining agreement through a damages award that is to the contrary.[3]

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[2] Justice O'Connor's chambers opinion in *Western* v. *Teamsters*, 480 U.S. 1301 (1989), does not detract from the precedents cited in the text. In the posture in which it reached the Court, that case dealt with the narrow issue of "the effect of the injunction" in preventing the merger. Pet. App. 17a. Justice O'Connor concluded that the injunction there would in fact constitute a ruling on a representation dispute. *Id.* at 1306, citing *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983). As the court below noted, Justice O'Connor's opinion does not address "the question whether a claim for damages might survive a merger." Pet. App. 18a.

[3] Delta does cite three cases in support of its argument that the Court should grant *certiorari* to relieve the company of the inconsistent obligations under which it purportedly finds itself. Pet. 23 n.3, citing *Gondeck* v. *Pan American World Airways Inc.*, 382 U.S. 25 (1965); *Maryland* v. *U.S.*, 381 U.S. 41 (1965); *Int'l Typographical Union* v. *NLRB*, 365 U.S. 705, *rehearing denied*, 366 U.S. 941 (1961). However, in those cases any inconsistent obligations arose out of conflicting judicial decisions. In this instance, as in *W.R. Grace* and *Belknap*, any inconsistent obligations arise not out of judicial action, but because Western chose to honor a merger

2. Having literally no other choice, the petitioner seeks to manufacture a conflict among the circuits. But in each of the cases relied upon in this regard, the union sought not damages but *specific post-merger performance of its collective bargaining agreement, in whole or in part.* In that context, the courts have found that the relief sought was the equivalent of an order establishing *post-merger representation rights*, and that such an order would conflict with the NMB's exclusive jurisdiction to resolve representation disputes. Pet. 10-11.[4]

The court of appeals expressly agreed with the holding in those cases that "the question whether a union's certification survives an airline merger is a matter within the exclusive jurisdiction of the NMB." Pet. App. 13a. The court below, again in complete agreement with the cases relied upon by petitioner, also ruled that AFA has no post-merger right to represent the former Western flight attendants now that the merger has taken place

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agreement in derogation of a promise set forth in its collective bargaining agreement. Thus, these cases are inapposite.

As we discuss below, no conflict among the circuits exists in this case.

[4] *E.g., Air Line Employees Ass'n* v. *Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (court has no jurisdiction over union's suit to enjoin implementation of agreement between carrier and two other unions which promised to grant exclusive representation rights to the rival unions after consummation of an operational merger); *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983) (court lacks jurisdiction where union representing group of employees whose company merged into a larger airline filed suit to force merged airline to recognize it as the employees' representative after the merger); *Bhd. of Ry. & S.S. Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (court lacks jurisdiction to declare union's collective bargaining agreement binding on merged airline); *Independent Union of Flight Attendants* v. *Pan American World Airways, Inc.*, 836 F.2d 130 (2d Cir. 1988) (union's attempt to enforce collective bargaining agreement on newly acquired subsidiary raises dispute as to who represents employees of the subsidiary, therefore, court has no jurisdiction).

and the NMB has extinguished AFA's certification, and noted that the Union did not contest this ruling. Pet. App. 8a. However, that court concluded that this fact "simply does not answer the question whether Delta is answerable in damages for Western's alleged *pre-merger* breach of . . . [the successorship] clause." *Id.* (emphasis added).

None of these cases dealing with specific performance of a successorship provision after consummation of a merger addresses whether an employer can first promise not to enter into a particular form of merger, then breach its promise, and having done so, escape liability in damages because of its breach.[5] The court of appeals correctly found that the injunctive or declaratory claims for relief in the cases cited by the petitioner were "*de facto* claims to judicial certification of the plaintiff union's representative status" post-merger. Pet. App. 16a. As already noted, however, the court ruled below that in this case, an arbitrator could find that the successorship clause required Western to structure a merger

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[5] The court below rejected Delta's assertion that the Second Circuit's decision in *Air Line Pilots Ass'n* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), treats with the damages issue presented here. In that case, the union tried to extend its representation rights to employees of a newly established subsidiary through an action to enforce its contract. The union also sought a judicial award of damages for the company's failure to recognize it as the representative of the subsidiary's employees, an issue not presented in the instant case for pre-merger damages. *See* Pet. App. 21a.

Delta also claims that the Ninth Circuit rejected as moot an arbitral award of damages in *Teamsters*, 854 F.2d 1178 (9th Cir. 1988). However, the court below found that the Ninth Circuit merely held moot the unions' request for an order compelling arbitration and an injunction prohibiting the merger. Pet. App. 9a. Thus, the holding merely confirms the unavailability of specific performance post-merger. While AFA's complaint initially sought an injunction pending arbitration as an alternative to expedited arbitration, the Union did not pursue injunction proceedings in this litigation. Thus, the two cases reached the courts of appeals in entirely different postures, and confronted the courts with wholly distinct issues.

so that the company continued to operate as a separate subsidiary, thereby providing for survival of the collective bargaining agreement, and that Western breached this obligation.

Thus, in contrast to the cases relied upon by petitioner, "neither the certification . . . of a representative, nor the functional equivalent thereof, nor anything even remotely akin thereo, is at stake" in an arbitral award of damages for Western's pre-merger breach of contract. Pet. App. 18a. Recognizing that the very point of the enforceability of a successorship clause, like the enforceability of any other provision of a collective bargaining agreement, is to deter violations of the agreement, the court below stated:

> The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its . . . [collective bargaining agreement], it might forego entering into an otherwise desirable merger. [Pet. App. 23a].

There is, we submit, nothing wrong in that; indeed, the raison d'être of the law of contracts is to influence future conduct and to assure that prior promises are kept or damages are paid. Certainly, there is nothing in that basic contract rule that impinges on the NMB's authority and nothing that creates a representation dispute.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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